STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2011
v	No. 296680 Kent Circuit Court
ROBIN WESLEY JAMES, Defendant-Appellant.	LC No. 08-011834-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of third-degree fleeing and eluding, MCL 257.602a(3)(a), and the trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to a prison term of 9 months to 10 years. Defendant appeals as of right. We affirm.

At approximately 3:30 p.m. on October 24, 2008, Grand Rapids police sergeant Scott Doolittle observed a vehicle fail to signal for a turn onto southbound Eastern Avenue. The vehicle also had a loud exhaust. Doolittle positioned his semi-marked police cruiser behind the vehicle in order to effectuate a traffic stop. He activated the red and blue emergency lights on his cruiser, and, after approximately one and a half blocks, he activated the siren. Officer Lucas Nagtzaam was driving another semi-marked police cruiser behind Doolittle's cruiser. He also activated his emergency lights and siren. Sgt. Doolittle pulled his cruiser beside the vehicle and motioned for defendant to pull over. Defendant looked at him and kept driving for a total of ten blocks. Defendant's speed varied from 25 mph to 35 mph as he continued to drive southbound on Eastern. Defendant did not make any evasive maneuvers. Defendant's vehicle came to a stop behind other vehicles at a traffic signal. Doolittle and three other officers effectuated the traffic stop in the general location of WJNZ radio station. Officer Nagtzaam testified that as he pulled up toward defendant's vehicle, defendant stopped, lurched the vehicle forward about one foot, stopped again, moved the vehicle forward again, and then stopped again while the officers were standing by defendant's driver's side door.

Officer Chad McKersie went to defendant's driver's side door, pulled his gun out, and ordered defendant out of the vehicle. When defendant did not exit, Officer McKersie attempted to pull defendant out of the vehicle. As this was occurring, Officer Nagtzaam broke out defendant's front passenger side window with his baton as a "distraction technique." Nagtzaam indicated that it was raining and he could not see inside the vehicle, and he was afraid that

defendant had a weapon. Doolittle, Nagtzaam, and Collard all testified that after defendant was out of the vehicle and on the ground, he struggled in an attempt to get away. The officers had trouble getting defendant's hands behind his back. Doolittle kicked defendant once or twice on the right side of the leg in an attempt to distract defendant and get him to release his arms. According to Doolittle, the officer's actions were standard practice and procedure. The pursuit of defendant, as well as the arrest, was video recorded and shown to the jury.

Officer Geoff Collard testified and wrote in his report that once defendant was arrested and placed in the police cruiser, defendant said, "All this over a loud muffler?" Collard responded, "No, all this because you didn't pull over for the police." Defendant responded, "I had nowhere to pull over." Defendant agreed that he made this statement.

Defendant testified that he was driving on Eastern and was on his way to get his defective exhaust repaired. He stated that he noticed the emergency lights behind him but that he kept driving because he had done nothing wrong and thought that the police were pursuing someone else. He did not pull over to allow the police officers to pass him because they "were not that close to him." After approximately one block he realized that the officers were attempting to pull him over. Defendant conceded that he did not comply. He indicated that he was not speeding or attempting to evade the officers. Defendant testified that he did not pull over because felt unsafe and wanted to have witnesses when he stopped, "just in case something happened." He stated that he wanted to go to the WJNZ radio station because it is "tailored to the black community." He acknowledged that he passed by gas stations and businesses on the way to the radio station, but that he did not stop because he wanted the protection of black witnesses. He testified that a majority of the Grand Rapids police officers are white and he was afraid of being "roughed up." However, he acknowledged that he could not see the officers who were in the cruisers that were pursuing him.

According to defendant, when he arrived at the radio station traffic was backed up at an intersection and he was not able to pull over to the right. He stopped next to the vehicles by the radio station. He stated that as he put the car in park it lurched forward.

Defendant argues that he was denied the effective assistance of counsel at trial. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882, (2008). In this case, our review is limited to the apparent errors in the record because defendant failed to request an evidentiary hearing on his claim of ineffective assistance of counsel. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

Defendant asserts that defense counsel's comment during opening statements that the police acted reasonably in removing defendant from his vehicle effectively destroyed his defense that he did not immediately stop due to his fear of police brutality. However, given the defense theory that defendant did not intend to flee and elude, the relevant issue was not the propriety of

the officers' action after they stopped defendant but, rather, what defendant's intent was in refusing to obey the police command to stop.

Defense counsel asserted during his opening statement that defendant did not have the intent to flee and elude the police. He asserted that

> "[A]ll Robin wanted to do was go down to WJNZ on the corner of Ardmore and Eastern and pull over. That's all he wanted to do. The reason he wanted to do that is because he felt safe, that's all. He felt safe. That's all he wanted to do. . . . Now Robin is not going 100 miles an hour. He's going the speed limit, basically the speed limit, 25 to 35 miles an hour. He's going the speed limit. You never see him duck down the alleyway. You never seem him try to go down a side street. He just keeps on going the speed limit. . . [W]hen you hear all the evidence in this case, . . . it seems to me it will be evident to you that Robin James didn't have the intent to flee and elude based on what you observe on that tape and the evidence you hear from the witnesses.

During the cross-examination of Sgt. Doolittle, defense counsel established that defendant was not involved in a high speed chase and that the top speed at which he traveled was 35 miles per hour. He established that defendant never took evasive action and continued to drive southbound on Eastern. During the cross-examination of Officer Nagtzaam, defense counsel established that defendant ultimately stopped in the vicinity of radio station WJNZ. He also established that defendant was driving a vehicle registered to him and that no contraband was found in the vehicle.

During closing arguments, defense counsel reminded the jury that the issue for them to decide was whether the prosecution had proved beyond a reasonable doubt that that defendant's intent was to flee and elude. Counsel noted that:

> One area that is not an issue in this case is this whole resisting. It's not an issue whether Robin James resisted police officers. He's not charged with a felony of resisting and obstructing. And that ought to tell you something. That out to tell you something right there, whether he resisted or not.

Counsel also argued that:

> I mean, was this a high speed chase going through the streets of Grand Rapids or going down 131? Robin James went about a mile, went about a mile at about 25 to 35 miles an hour. And you saw that tape. Did he ever once try to elude the officers? Did he ever try to go up a back alley? I mean when you read in the newspaper . . . about fleeing and eluding, what do you usually read about in the paper? You read about some person going down 131 going 100 miles an hour and weaving in and out of traffic to escape the police. Did you ever see that or was there any testimony about that in this case? Not at all. Never went down an alleyway, never went down a side street, just kept on going to where he told you he wanted to go.

Trial counsel effectively argued that defendant only intended drive to a safer area to pull over and was not attempting to flee; therefore, defendant lacked the requisite intent to be found guilty. While examining witnesses and defendant, trial counsel asked questions in search of support for the lack of intent defense. Defense counsel's acknowledgement that the police acted reasonably *after* effectuating the traffic stop, particularly in light of the videotape of defendant's behavior during the stop, neither destroyed defendant's defense[1] nor constituted ineffective assistance of counsel. Although defense counsel chose not to cross-examine two of the police officers, "[d]ecisions concerning which witnesses to call, what evidence to present, or the questioning of witnesses are considered part of trial strategy," which "courts will not second-guess." *People v Bass (On Rehearing)*, 223 Mich App 241, 252; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998); *Gonzalez*, 468 Mich at 644-645. Additionally, an examination of the record does not establish that cross-examining those police officers would have been of any benefit to defendant.[2] Defendant has failed to "show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003); *Strickland v Washington*, 466 US 668, 687, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

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[1] Disputing the officers' treatment of defendant was not part of defendant's defense that he lacked the intent to flee and elude.

[2] One of the officers merely testified that he arrived on the scene after the struggle had subdued and that he handcuffed defendant and put him in the cruiser. The other officer testified that he drew his gun for safety at the scene because defendant was not cooperating and the officers had no knowledge of why defendant had refused the command to stop his vehicle.